IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS (OKAAP), *et al.*,	)	
Plaintiffs,	)	
vs.	)	**No. 01-CV-0187-EA(J)**
MICHAEL FOGARTY, Chief Executive Officer of the Oklahoma Health Care Authority (OHCA), *et al.*,	)	
Defendants.	)	

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH REGARD TO PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEY FEES

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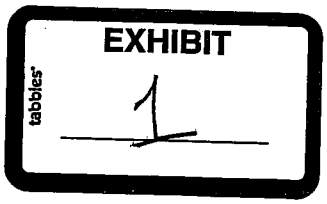

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules

Miscellaneous

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FINDINGS OF FACT

PROCEDURAL BACKGROUND

A. The Litigation

1. Plaintiffs filed this action in March 2001, alleging that Defendants' acts and omissions deprive Oklahoma's Medicaid-eligible children of the health care and treatment to which those children are entitled under Title XIX of the Social Security Act (hereinafter referred to as "Title XIX" or "the Medicaid Act"). Complaint, 3/19/01. More specifically, Plaintiffs sought, under 42 U.S.C. § 1983, to enforce their right to receive early and periodic screening, diagnosis and treatment ("EPSDT") services as set forth in 42 U.S.C. §§ 1396a(a)(8), 1396a(10)(A), 1396d(a)(4)(B)(2) and 1396d(r). Plaintiffs further specifically alleged that Defendants had failed to furnish Medicaid-eligible children with necessary EPSDT services with reasonable promptness in violation of § 1396a(a)(8), and that Defendants have failed to set provider reimbursement rates at a

sufficient level to assure recipients equal access to quality health care, in violation of 42 U.S.C. § 1396a(a)(30)(A). Plaintiffs sought injunctive relief to ensure that eligible children do actually receive that care.

2. On May 21, 2002, the Court denied Defendants' Motion to Dismiss. *OKAAP v. Fogarty*, 205 F.Supp.2d 1265 (N.D.Okla. 2002) ("*OKAAP I*"). On May 30, 2003, the Court certified and determined the Plaintiff class to be: "all children under the age of 21 who are now, or in the future will be, residing in Oklahoma and who have been, or will be, denied or deprived of Medical Assistance as required by law." Order, 5/30/03 at 14.

3. The Court held a non-jury trial for 19 days in April and May 2004.

B. The Court's Decision and Relief Granted

4. On March 22, 2005, the Court entered its Findings of Fact and Conclusions of Law. *OKAAP v. Fogarty*, 366 F.Supp.2d 1050 (N.D.Okla. 2005) ("*OKAAP II*"). Based upon its extensive Findings of Fact, the Court concluded that, "in violation of 42 U.S.C. § 1396a(a)(30)(A), Defendants are not assuring that payments are sufficient to enlist enough providers so that care and services are available to Medicaid-eligible children to the extent that such care and services are available to the general population in the geographic areas served by the OHCA (*i.e.*, Defendants are not assuring "equal access")." *OKAAP II*, 366 F.Supp.2d at 1106. The District Court further concluded that Defendants have violated § 1396a(a)(30)(A) by failing "to assure that payments to providers are consistent with quality of care..." *Id.* at 1110. The District Court also held that Defendants "are not furnishing medical assistance with reasonable promptness to all eligible individuals, in violation of 42 U.S.C. § 1396a(a)(8)." *Id.* at

1109. With regard to the comprehensive health screening periodicity schedule, the Court held that Defendants have violated federal law by failing to draft the periodicity schedule in "'consultation with recognized medical and dental organizations involved in child health care.'" *Id.* at 1112 (quoting 42 U.S.C. § 1396d(r)(1)(A)(i)).[1]

5. On May 19, 2005, the Court entered its Final Judgment and Permanent Injunction. Dkt. #288. As part of the Final Judgment and Permanent Injunction, the Court ordered Defendants to:

- Institute, as an immediate interim measure, a new Medicaid fee schedule for all covered medically necessary physician services provided to minor children at a rate which equals one hundred percent (100%) of the rate paid by Medicare;
- Contract with a "nationally recognized economic consulting firm" to conduct a study to determine the Medicaid provider reimbursement rates which are necessary "to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program";
- Complete the rate study "within six months of the date that the contract is executed by the parties";
- Institute, following completion of the rate study, a new Medicaid fee schedule "determined by the consulting firm as necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program"; and
- Assure that the Oklahoma Health Care Authority ("OHCA") "immediately adopts and implements new periodicity schedules (for periodic comprehensive medical screening examinations and vision screening examinations) after consultation with recognized medical and dental organizations involved in child health care..."

Id. at 3-6.

[1] The Court also ruled against the Plaintiffs on some issues, concluding that: (1) Defendants "are in substantial compliance with all EPSDT provisions of the Medicaid Act" except for the provision requiring consultation with recognized medical and dental organizations involved in child health care prior to establishing the periodicity schedule; (2) Defendants' auto-assignment/default enrollment system does not constitute a violation of 42 U.S.C. § 1396u-2(a)(4)(D); (3) Defendants' cross-agency relationship with DHS does not constitute a violation of 42 U.S.C. § 1396a(a)(11)(A); and (4) in compliance with federal law, Defendants may refuse to pay for the asthma medication, Xolair. *OKAAP II*, 366 F.Supp.2d at 1119.

6. The Court Clerk issued an Order on Bill of Costs on October 5, 2005 against Defendants in the amount of $25,038.08. Dkt. #346. The Court subsequently entered an Order and Opinion on Plaintiffs' Motion for Judicial Review of the Court Clerk's Order on Bill of Costs (Dkt. #347), and ordered that Defendants pay Plaintiffs an additional $985.43 in costs. Dkt. #372. Defendants subsequently appealed these costs Orders.

C. Plaintiffs' Motion for an Award of Attorney Fees

7. Plaintiffs filed their Motion for an Award of Attorney Fees ("Motion for Fees") on July 14, 2005, seeking reasonable attorneys fees and expenses incurred in connection with the successful prosecution of the case at bar. Plfs. Ex. 1. The Court held a full evidentiary hearing on Plaintiffs' Motion for Fees on June 29 and 30, 2006.

IT IS UNCONTESTED THAT PLAINTIFFS ARE THE "PREVAILING PARTY"

8. This Court has already concluded that "Plaintiffs...succeeded on the **most significant issues in the litigation** and achieved a significant part of the relief they sought in bringing suit." Opinion and Order, 7/5/05, at 2 (Dkt. 320) (emphasis added). Furthermore, Defendants have admitted that Plaintiffs are the prevailing party in this matter. Tr. 6/30/06 at 299-300.

PLAINTIFFS HAVE ACHIEVED EXCELLENT RESULTS

9. Above and beyond Plaintiffs' prevailing party status, Plaintiffs have clearly achieved excellent results in the case at bar. Plaintiffs offered the expert report and testimony of Sarah Rosenbaum. Plfs. Exs. 2-4. Ms. Rosenbaum is a lawyer and the Hirsh Professor of Health Law and Policy at the George Washington University School of Public Health and Health Services. Plfs. Ex. 3 at 1. She has extensive experience as a

lawyer and educator in the field of Title XIX law, especially with regard to children. *Id.* at 1-5; Plfs. Ex. 4. Indeed, Ms. Rosenbaum's expertise with regard to EPSDT is virtually unparalleled. Ms. Rosenbaum is "probably considered the nation's leading expert in that branch of Medicaid known as EPSDT." Plfs. Ex. 5 at 16. Defendants have not contested Ms. Rosenbaum's expertise or qualifications.

10. With regard to the results achieved by Plaintiffs in the case at bar, Ms. Rosenbaum has found that the case "represents the first of its kind in more than three decades of EPSDT litigation." Plfs. Ex. 3 at 18. According to Ms. Rosenbaum, the case at bar is "singular in linking children's EPSDT access and provider payments." *Id.* Ms. Rosenbaum is not aware of any other EPSDT case in which the court ordered, even on an interim basis, an across-the-board increase in Medicaid provider reimbursement rates such as the Court ordered here. Plfs. Ex. 5 at 24.

11. Lead Plaintiffs' lawyer Louis W. Bullock has characterized the results achieved by Plaintiffs in the case at bar as "excellent." Tr. 6/29/06 at 47. As Mr. Bullock testified in particular:

> The result of this [case] was to find widespread failures in the Oklahoma Medicaid system and provided an order focused on making changes throughout that system. The primary and most notable part of it was to change the rates for practitioners who are treating Medicaid children so that it's a hundred percent of Medicare.
>
> To appreciate what that means is that there was over a 25 percent increase in the rates that were being paid, and moved Oklahoma from being one of the lowest paying states in the nation to at least, according to the [OHCA] recently, to being the fifth highest. And that promises to have a remarkable impact upon the delivery of services for children.

Id. Also, like Ms. Rosenbaum, Mr. Bullock is unaware of any other Title XIX case where the court has ordered such a large rate increase. *Id.* at 48.

12. The results achieved by Plaintiffs are also notable in that the Court ordered Defendants to perform a comprehensive rate study. Plfs. Ex. 3 at 18.; Plfs. Ex. 5 at 21-3. As Ms. Rosenbaum has explained:

> ...the Court appears to have done something that most courts don't do in these kinds of cases. I think a very valuable and important decision on the Court's part, which is to take a step back, order interim relief, but then order a thorough review by the state in relation to the end result everybody seeks here, which is appropriate access to health care for children.

Plfs. Ex. 5 at 22.

13. Defendants have offered no evidence that the results obtained by Plaintiffs are anything but excellent. Defendants' lone witness, James Schratz, conceded at the fee hearing that he had "come to no conclusion...one way or the other" as to whether Plaintiffs have achieved excellent results. Tr. 6/29/06 at 164. Considering the excellent results obtained by the Plaintiffs, there is no basis to disallow fees for "limited success obtained" as recommended by Mr. Schratz. *See* Dfts. Ex. 1 at 26-7.

PLAINTIFFS' CLAIMS FOR RELIEF INVOLVED A COMMON CORE OF FACTS AND RELATED LEGAL THEORIES

14. All of Plaintiffs' claims in the case at bar involved a common core of facts and related legal theories. All of the legal claims at trial involved provisions of Title XIX, also known as the Medicaid Act. *See* Complaint, Dkt. #1; Tr. 6/29/06 at 46-7. All of the claims for relief were related to the provision of medical care to Medicaid-eligible children. *Id.* The core facts and legal theories underlying Plaintiffs' claims were all focused on the delivery of prompt, reasonable and equal health care to Medicaid-eligible children. *Id.*

THE CASE AT BAR WAS HIGHLY COMPLEX

15. The case at bar was perhaps the most complex case of its kind in the history of Title XIX litigation. As part of her expert report, Ms. Rosenbaum presented her analysis of the complexity of the case at bar in comparison to other Medicaid litigation involving medical assistance to children (i.e. EPSDT). Plfs. Ex. 3. In conducting her analysis, Ms. Rosenbaum constructed what she refers to as an EPSDT "complexity spectrum." *Id.* at 9. The "complexity spectrum" was based upon Ms. Rosenbaum's "knowledge of health services research literature regarding financing and access, as well as [her] research into EPSDT caselaw and related literature." *Id.* This "complexity spectrum" includes three categories of EPSDT-related cases: (1) non-factually complex cases; (2) semi-complex cases; and (3) highly complex cases. *Id.* at 10. In her report, Ms. Rosenbaum gives concrete examples of each kind of case and explains the basis of her conclusion as to the complexity of each. *Id.* at 11-17.

16. The "highly complex" cases are those which raise the issues of access to health care and involve the central question of "whether the state's approach to the conduct of its obligations, including financing covered services, organizing its systems of care for children, or effectuating its obligation to ensure access to care within a reasonable timeframe, has violated provisions of federal law in the context of EPSDT." *Id.* at 14-15. Ms. Rosenbaum has concluded that the case at bar lies at the "outer reaches" of the "highly complex" end of the "complexity spectrum." *Id.* at 9. Ms. Rosenbaum has specifically concluded that the case at bar "stands out, even among complex EPSDT cases." *Id.* at 17. Ms. Rosenbaum bases this conclusion on the fact that the case at bar involves a managed care environment and "has added an explicit focus on

the question of provider payment and the nexus between provider payment and access, using extensive financial data, original survey research and a wealth of other complicated financial and health evidence." *Id.* She expressly notes that in order to litigate this case to a successful conclusion, Plaintiffs had to make a series of "complex and related evidentiary showings: that the state's fee structure is low compared to Medicare; that low fees are associated with non-participation in the [Medicaid] program; that non-participation in the program among pediatric generalists and specialists leaves Medicaid-enrolled children at a disproportionate risk for failure to receive any care in a timely fashion, or care of an appropriate quality and caliber in a timely fashion." *Id.* at 16.

17. Mr. Bullock, who has litigated institutional reform class action cases for nearly thirty years, testified that the case at bar "has to be the most complex that [he has] brought." Tr. 6/29/06 at 48. Mr. Bullock came to this conclusion due to: (1) the complex nature of the Medicaid statute and regulations; (2) the "in flux"/"moving target" nature of the legal structure; and (3) the factual complications in proving the violations of law. *Id.* at 48-9. The case was "extraordinarily document intensive." *Id.* at 57. Plaintiffs introduced nearly 700 exhibits at trial. *Id.* at 58. Further demonstrating the complexity of the case is the fact that Plaintiffs' called ten (10) national expert witnesses, who all provided expert witness reports. *See* Pretrial Order, Dkt. # 196 at 71-78. In addition to these national experts, Plaintiffs further called over twenty (20) local physicians to testify at trial. *Id.*

18. While Defendants' expert, Mr. Schratz, has testified that the case at bar is not highly complex, his testimony in this regard is unavailing. Mr. Schratz has no expertise with regard to Title XIX litigation. Tr. 6/29/06 at 165. In fact, when

questioned, Mr. Schratz admitted that he did not even know what Title XIX is. *Id.* at 144 and 165. Furthermore, aside from the case at bar, Mr. Schratz has no experience in auditing Medicaid Act (Title XIX) cases. *Id.* at 144-45. More generally, Mr. Schratz has never tried a class action case as an attorney, and the only class actions he has been involved in were not complex. *Id.* at 144. Thus, Mr. Schratz simply does not have the expertise or qualifications to rebut the testimony of Ms. Rosenbaum or Mr. Bullock with regard to the complexity of the case at bar.

THE HOURLY RATES REQUESTED BY PLAINTIFFS ARE REASONABLE

19. The evidence in the case at bar clearly demonstrates that the hourly rates requested by Plaintiffs are immanently reasonable. The hourly attorney rates requested by Plaintiffs are as follows:

Attorney	Hourly Rate Sought
Louis W. Bullock	$300.00
Patricia W. Bullock	$250.00
Robert M. Blakemore	$165.00
Michael J. Lissau	$185.00
Thomas Gilhool	$300.00
James Eiseman, Jr.	$300.00
Michael Churchill	$300.00

See Quinn Cooper Report, Plfs. Ex. 6 at 2.[2] These requested hourly rates are based upon the recommendations of Plaintiffs' expert, Mary Quinn Cooper ("Ms. Quinn Cooper"). *Id.*

20. Plaintiffs retained Ms. Quinn Cooper as their expert on hourly rates. Ms. Quinn Cooper is a local Tulsa attorney with nearly twenty (20) years of experience. Tr.

[2] Plaintiffs have amended their initial requested hourly rates to conform with the rates proposed by Plaintiffs' expert, Ms. Mary Quinn Cooper. The only difference between the rates originally requested and the rates proposed by Ms. Quinn Cooper is that while Plaintiffs had requested $350 an hour for Messrs. Gilhool, Eiseman and Churchill, Ms. Quinn Cooper has concluded that $300 an hour is a reasonable rate for those three attorneys.

6/29/06 at 10. She is a founding partner in the Tulsa firm of Eldridge, Cooper, Steichen & Leach, and was a partner with the Tulsa firm of Rhodes, Hieronymous, Jones, Tucker & Gable from approximately 1991 to 2002. *Id.* at 11. Ms. Quinn Cooper is rated "AV" by Martindale-Hubbell. Plfs. Ex. 6 (attached CV). Ms. Quinn Cooper has extensive experience in litigating class action cases in federal court and is admitted to practice before the United States District Courts for the Northern, Eastern and Western Districts of Oklahoma as well as the Eighth and Tenth Circuit Courts of Appeal. Tr. 6/29/06 at 10-11.

21. In arriving at her opinion on reasonable hourly rates, Ms. Quinn Cooper reviewed the following documents:

1) Plaintiffs' Motion for an Award of Attorney Fees and Brief in Support with all attached exhibits, Dkt. # 330 (Plfs. Ex. 1);
2) Deposition of Louis W. Bullock;
3) Defendants' Response to Plaintiffs' Application for an Award of Attorney Fees and Expense with all attached exhibits, Dkt. # 348;
4) Plaintiffs' Reply in Support of Motion for an Award of Attorneys' Fees with all attached exhibits, Dkt. # 357;
5) August 29, 2003 Order in *Johnson v. City of Tulsa*;
6) Year 2004 Local Rate Survey of Tulsa Law Firms;
7) Year 2005 Local Rate Survey of Tulsa Law Firms (Plfs. Ex. 12); and
8) Year 2006 Local Rate Survey of Tulsa Law Firms (Plfs. Ex. 11).

See Quinn Cooper Report, Plfs. Ex. 6 at 2; Tr. 6/29/06 at 13. Specifically, with regard to determining a reasonable hourly rate for Mr. Bullock, Ms. Quinn Cooper also considered the hourly rates being charged by local attorneys who she believed to be comparable in experience to Mr. Bullock. *Id.* at 14-15; and 100-101. For instance, local attorney Pat Cremin charges his clients $325 an hour and local attorney Joel Wohlgemuth bills his clients at a rate of $300 an hour. *Id.* at 100-101.

22. The annual Local Rate Surveys relied upon by Ms. Quinn Cooper clearly demonstrate that the above-described hourly rates requested by Plaintiffs are well within the range of hourly rates charged by other lawyers in the local community with similar levels of experience. Plfs. Exs. 12 and 11. Further, when one considers the particular experience and expertise that Plaintiffs' lawyers have in the pertinent specialty of civil rights class action litigation, the hourly rates requested are all the more reasonable. *See* resumés of L. Bullock, P. Bullock, Lissau, Blakemore, Gilhool, Eiseman and Churchill, Plfs. Exs. 13-19. The qualifications and accomplishments of these attorneys are all impressive and have not been contested by Defendants.

23. For instance, in addition to their over fifty-five (55) years of combined experience, both Louis and Patricia Bullock have won numerous honors and awards for their work in civil rights litigation, most recently receiving the American Academy of Pediatrics' Child Health Advocate award for their work in the case at bar. AAP Certificates, Plfs. Ex. 20; and Plfs. Exs. 13-14. Over their long careers, Louis and Patricia Bullock have successfully prosecuted some of the most well-known and significant civil rights class action cases in Oklahoma history, including *Battle v. Anderson, Homeward Bound v. Hissom* and *Johnson v. City of Tulsa*. Plfs. Exs. 13-14. The Bullocks' rate of success in litigating civil rights class action cases is undeniable. As Mr. Bullock testified, over his thirty (30) year career in litigating such cases, including the case at bar, his rate of success is 100%. Tr. 6/29/06 at 44-45.

24. The requested hourly rates of $300 for Louis Bullock and $250 for Patricia Bullock are reasonable.

25. Plaintiffs' lawyers with the Public Interest Law Center of Philadelphia ("PILCOP") have irrefutable expertise in the area of Title XIX litigation. Following are some of the facts regarding Mr. Gilhool's experience, expertise and skill:

- Over 40 years of experience as an attorney (Yale Law School, 1964);
- 26 years of experience with the Public Interest Law Center of Philadelphia ("PILCOP");
- Pennsylvania Secretary of Education (1987-1989);
- Lead plaintiffs' counsel in the groundbreaking persons with disabilities rights case, *Halderman v. Pennhurst State School and Hospital*, 465 U.S. 89 (1989);
- Recognized by historian/writer Fred Pelka as: "the attorney most responsible for the rise of community services for people with developmental disabilities, allowing for their deinstitutionalization beginning in the 1970s"; and "pivotal in establishing the constitutional right of children with disabilities to a public education." *See* F Pelka, The ABC-CLIO Companion to the Disability Rights Movement, ABC-CLIO Press, 1997;
- Co-authored brief on the history of state-imposed segregation of people with disabilities, which contributed to Justice Marshall's opinion in the landmark case, *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985).

See Gilhool Resume, Plfs. Ex. 17.

26. Michael Churchill, chief counsel of PILCOP, possesses experience and qualifications similar to those of Mr. Gilhool. Plfs. Ex. 19.

27. Mr. Eiseman began work at PILCOP on September 2, 2003. Prior to that date, he had a distinguished 36-year career as a commercial litigator at the Philadelphia law firm of Drinker Biddle & Reath, LLP. He has been a member of the Pennsylvania Bar since November of 1966. Tr. 6/30/06 at 239-240; Plfs. Ex. 18.

28. Shortly after Mr. Eiseman's arrival at PILCOP, he was introduced to Louis and Patricia Bullock and began working on the case at bar. Tr. 6/30/06 at 270-272. During Mr. Gilhool's absence, Mr. Eiseman served as the link to collect and convey PILCOP's Medicaid expertise to Plaintiffs' efforts. Tr. 6/30/06 at 241.

29. An hourly rate of $300 is reasonable for the PILCOP lawyers.

30. Mr. Schratz has recommended that the Court impose drastic reductions in the hourly rates requested by Plaintiffs. Dfts. Ex. 1 at 8-11. However, Mr. Schratz offers no valid basis to reduce Plaintiffs' requested hourly rates.

31. First, Mr. Schratz admitted at the hearing that he had no knowledge of the hourly rates charged by lawyers in the Tulsa community other than what he had learned from Ms. Quinn Cooper's testimony and from reading fee orders from the *Johnson v. City of Tulsa* and *Homeward v. Hissom* cases. Tr. 6/29/06 at 152. Thus, Mr. Schratz has no particular expertise with regard to local market rates, and any expertise he might have is obviously inferior to the expertise of Ms. Quinn Cooper. Mr. Schratz's admitted dearth of knowledge as to local market rates renders his testimony on the subject to be of little use to the Court.

32. Secondly, the hourly rates recommended by Mr. Schratz for the Bullock & Bullock lawyers are not current rates. Mr. Schratz bases his recommended Bullock & Bullock rates on the stipulated hourly rates awarded to Plaintiffs for the services of Louis Bullock, Patricia Bullock and Robert Blakemore in the unrelated case, *Homeward Bound, Inc. v. Hissom Memorial Center*, Case No. 85-C-437-E (N.D.Okla.). Dfts. Ex. 1 at 9-10. However, the stipulated rates awarded in *Homeward Bound*, which Mr. Schratz relies on, are historic rates, originally **awarded in August of 2003** by Judge Holmes in yet another

unrelated civil rights case, *Johnson v. City of Tulsa*, Case No. 94-CV-39-H(M) (N.D.Okla.). Tr. 6/29/06 at 72-3. Therefore, the rates recommended by Mr. Schratz for the Bullock & Bullock lawyers are **three (3) years old.**

33. Also, Mr. Schratz admitted at the fee hearing that he has no idea whether hourly rates have increased in Tulsa over the past three years. Tr. 6/29/06 at 152-3. It is common knowledge that a lawyer's hourly rate nearly always increases with time. The Local Rate Survey of Tulsa Law Firms relied upon by Plaintiffs bears this out. Plfs. Exs. 11-12. For instance, while Plaintiffs' lawyer Robert Blakemore had less than three years of experience at the time fees were awarded in *Johnson*, he now has over five years of experience. Blakemore Resume, Plfs. Ex. 16. The 2006 Rate Survey shows that the requested rate of $165 an hour for Mr. Blakemore is well within the range of **current** hourly rates billed in this community for lawyers with similar experience, with some firms billing well in excess of $165 an hour for lawyers with four to six years of experience. Plfs. Ex. 11. Furthermore, the Court must consider the fact that Mr. Blakemore has gained particular expertise in the area of civil rights class action litigation. Since joining Bullock & Bullock in October 2001, Mr. Blakemore's practice has been largely focused on civil rights class action litigation under the tutelage of Louis and Patricia Bullock, two of the most accomplished civil rights attorneys in the history of this State. Plfs. Ex. 16.[3]

[3] Also, while $150 an hour was a reasonable rate for the services of Mike Lissau in August of 2003, Mr. Lissau now has over seven years of litigation experience. Lissau Resumé, Plfs. Ex. 15. Mr. Lissau has represented to the undersigned counsel that his firm, Hall Estill, now bills clients $185 an hour for his time. Mr. Lissau is a partner with the Hall Estill firm and is highly skilled and experienced in federal litigation. Again, the 2006 Local Rate Survey shows that this is a reasonable rate for a lawyer with Mr. Lissau's experience. Plfs. Ex. 11 at 3.

34. In three years, Louis Bullock has gone from a lawyer with twenty-seven years (27) of experience to a lawyer with over thirty (30) years of experience, while Patricia Bullock has gone from a lawyer with twenty (22) years of experience to a lawyer with over twenty-five (25) years of experience. Plfs. Exs. 13-14. Lawyers with the Bullocks' level of experience, accomplishment and skill should not have their hourly rates frozen for a period of three years, and Mr. Schratz has offered the Court no good reason why they should be.

35. Simply put, Defendants have offered no reliable evidence in support of Mr. Schratz's recommended reductions in the requested hourly rates for the Bullock & Bullock lawyers.

36. Mr. Schratz's recommendation with regard to the PILCOP lawyers is similarly unavailing. Specifically, Mr. Schratz recommends that the PILCOP lawyers each be awarded $250 an hour. Dfts. Ex. 1 at 11. Mr. Schratz's rationale for this recommendation is that "the rate awarded to the PILCOP attorneys [should] not exceed the rate awarded to Mr. Bullock, the lead trial attorney in this case." *Id.* However, because Mr. Schratz's recommended rate of $250 for Mr. Bullock is based on an order which is over three years old, the PILCOP lawyers should not be subjected to these historic rates.

THE HOURS EXPENDED BY PLAINTIFFS' LAWYERS WERE REASONABLE

37. Plaintiffs seek reimbursement for a total of 4,127.95 hours of attorney time expended by the Bullock & Bullock lawyers and 565.60 hours expended by the PILCOP lawyers. Plfs. Ex. 2. Considering the excellent results obtained by Plaintiffs

and the complexity of the issues involved, the number of attorney hours sought by Plaintiffs is reasonable.

38. For his part, Mr. Schratz has identified several categories of attorney time which he has determined to be excessive or otherwise unreasonable. Based upon these identified categories of time, Mr. Schratz has recommended that the Court impose dramatic reductions in the fees sought by Plaintiffs. However, none of Mr. Schratz's recommendations in this regard are convincing, and no reductions are warranted.

A. Minimum Billing Increment

39. Mr. Schratz has recommended a five percent (5%) disallowance of the total fees billed by Bullock & Bullock, or a total of $42,744.07, to account for what he considers to be "excessive fees" resulting from the practice of billing in quarter hour increments. Dfts. Ex. 1 at 12-13. However, Mr. Schratz only identified "a ***total*** of 15.0 hours and $2,196.25 in fees billed in single time entries of .25." *Id.* at 12 (emphasis added). Mr. Schratz admitted at the fee hearing that the total number of hours he identified as quarter hour increments amounted to approximately .03% of the overall total number of hours billed by Plaintiffs' counsel. Tr. 6/29/06 at 172. Considering the insignificant number of billing in quarter hour increments, there does not appear to be a justification for any reduction, let alone the sweeping 5% reduction urged by Mr. Schratz.

B. Trial Preparation Activities

40. Mr. Schratz also argues that the time expended by Plaintiffs' counsel in "trial preparation activities" was excessive and recommends a **twenty-five percent (25%)** reduction of this time, resulting in a total disallowance of $67,852.88. Dfts. Ex. 1 at 14-16. However, Mr. Schratz offers no meaningful support for this recommendation.

He does not provide the Court with even a single "trial preparation" time entry which he has identified as being excessive or unnecessary. Instead, Mr. Schratz generally asserts that the time expended in "trial preparation" was excessive and that, therefore, the 25% disallowance is warranted.

41. In support of this assertion, Mr. Schratz claims that the ratio of hours which Plaintiffs' attorneys spent on trial preparation versus actual trial time was 10 to 1. Dfts. Ex. 1 at 15. Even if this ratio were accurate, Mr. Schratz offers no explanation of why such a ratio is excessive under the circumstances of the case or of how such a ratio translates into unnecessary hours expended. At the fee hearing, Mr. Schratz admitted that his 10-to-1 ratio standard has no basis in any published study or peer-reviewed article. Tr. 6/29/06 at 176. Mr. Schratz's opinion as to the excessive nature of the preparation time is further undercut by his lack of experience in litigating class action cases generally, and his lack of expertise as to Title XIX litigation specifically.

42. At the fee hearing, Mr. Bullock offered a reasonable explanation for hours expended by Plaintiffs' counsel in preparing for trial:

> ...[W]hat made the amount of time spent in trial preparation larger in proportion to what I think it normally would have been, is that the way we prepared this case was really efficient in the fact gathering and discovery phase.
>
> ***
>
> [B]ecause we could rely on Dr. Wright and his precision in terms of understanding what [identified physician witnesses] had to say, we didn't do the traditional witness interviews and screenings that you would [normally] do. The Defendants did very few depositions and none [of the witnesses Defendants did depose] were the primary witnesses at trial.
>
> And so our method of presenting those witnesses was that we...determined that they would be available for trial. I asked them to come over [in the days leading up to trial,] and that was the first time that we met that witness. We did the interview, we prepared them for trial, we prepared the witness outline, we took them to the courthouse, and we presented them.

***

> ...[S]o to say that our trial preparation was too great of a proportion of the case is only to say that we were very efficient in doing the fact gathering in the preliminary preparation of the case, not that we were inefficient in the way we prepared for trial.

Tr. 6/29/06 at 51-3. Defendants have offered no evidence that Mr. Bullock's explanation is inaccurate, and tellingly, Defendants do not allege that the time spent by Plaintiffs' counsel during the discovery phase was excessive. In sum, there is no persuasive evidence in the record that the time spent by Plaintiffs' counsel in preparing for trial was either excessive or unnecessary and, therefore, no reduction is warranted.

C. Multiple Attorneys at Trial

43. Mr. Schratz also complains about the fact that multiple Plaintiffs' attorneys billed for attending the trial. Dfts. Ex. 1 at 16-17. In this regard, Mr. Schratz recommends that the Court disallow the "trial attendance" fees billed by Mr. Eiseman on days he did not examine a witness and to disallow all fees billed by Mrs. Bullock for trial attendance. *Id.* at 17. However, the evidence presented demonstrates that the hours expended by Mr. Eiseman and Mrs. Bullock in trial attendance were not excessive, and no disallowance is warranted.

44. First of all, as Ms. Quinn Cooper testified, it is the "rule rather than the exception" in the Tulsa community to have multiple (i.e. more than two) attorneys attend trials in complex cases such as the case at bar (Tr. 6/29/06 at 17-18) and that fee paying clients in the Tulsa community pay for multiple attorneys to attend trials in complex cases. *Id.* at 18.

45. Leaving aside the fact that multiple attorneys attending trial is an accepted and standard practice in the Tulsa community, there are some fundamental errors in Mr.

Schratz's analysis. Mr. Schratz has identified 16.3 of 28.5 hours of Mr. Eiseman's time as trial attendance time which should be disallowed because Mr. Eiseman attended trial but did not examine witnesses on those days. Dfts. Ex. 1 at 16. However, Mr. Schratz acknowledged that it was not unreasonable for Plaintiffs to have had at least two lawyers in the courtroom at all times, even if one of them was not examining a witness that day. Tr. 6/29/06 at 131-132; 182-183; 187.

46. The record shows that Mr. Eiseman billed for 16.3 hours of trial attendance on the first 4 days of trial as follows:

April 5, 2004:	5.8
April 6, 2004:	6.0
April 7, 2004:	2.0
April 8, 2004:	2.5
	16.3

See Plfs. Ex. 23; and Tr. 6/30/06 at 7-10. Mr. Schratz's report erroneously states that Mr. Eiseman did not examine a witness on April 5, 2004. In fact, Mr. Eiseman examined Regina Hercules on April 5, 2004. Trial Transcript, Vol. I, 4/5/04 at 149 et seq. On April 6, 2004 and April 8, 2004, days on which Mr. Eiseman charged time for trial attendance and examined no witnesses, only one other of Plaintiffs' attorneys charged for trial attendance. Plfs. Ex. 23. Accordingly, Mr. Schratz's disallowance of Mr. Eiseman's trial time on April 6 and April 8 was inconsistent with Mr. Schratz's own rule of reasonableness. Therefore, even under Mr. Schratz's rule, Mr. Eiseman's charges for trial attendance on April 6 and 8 were reasonable.

47. On April 7, 2004, Mr. Eiseman charged 2.0 hours for trial attendance, put no witness on the stand, and there were two other Plaintiffs' attorneys in the court room. However, Mr. Eiseman's testimony justifies the reasonableness of the 2.0 hours trial

attendance he charged. On April 7, 2004 he had prepared Chrystal McQuerry (one of the class member's mothers), brought her to the courtroom and was waiting to put her on, but because of the length of the examination of preceding witnesses, Ms. McQuerry was not reached on April 7, 2004, and had to return on another day. Tr. 6/30/06 at 252-253; Plfs. Ex. 23. Therefore, under any rational standard, Mr. Eiseman's billing for trial attendance for April 5, 6, 7 and 8 totaling 16.3 hours was reasonable, and Mr. Schratz's proposed disallowance of those hours should be rejected.

48. As for Mrs. Bullock, Mr. Schratz has recommended that all 17.5 hours of the trial attendance time she billed should be disallowed. Dfts. Ex. 1 at 17. However, as with Mr. Eisman's time, Mr. Schratz's analysis of Mrs. Bullock's trial time is faulty. Eight hours of this time was billed for trial attendance on April 27, 2004. Plfs. Ex. 1; Tr. 6/30/06 at 336-37. Notably, Plaintiffs are **only** seeking fees in connection with trial attendance on April 27 for **two lawyers**, Louis and Patricia Bullock. *Id.* As such, disallowance of Mrs. Bullock's fees for attending trial on April 27 does not jibe with Mr. Schratz's own standard that two or less lawyers attending trial is acceptable. Similarly, Mrs. Bullock and Mr. Bullock were the only two Plaintiffs' lawyers who billed for trial attendance on April 30, 2004. Plfs. Ex. 1; Tr. 6/30/06 at 338. Therefore, there is clearly no basis to disallow Mrs. Bullock's 3.25 hours of trial attendance time for April 30 either.

49. The remaining trial attendance hours billed by Mrs. Bullock were for days when more than one other Plaintiffs' lawyer was also present, 2.5 hours on April 5 and 3.75 hours on April 28. Plfs. Ex. 1; Tr. 6/30/06 at 337. However, considering the importance of those two trial days, it was not unreasonable for Mrs. Bullock to bill for attending trial. April 5 was the first day of trial and April 28 was the day on which

Defendants' primary expert was cross-examined by Mr. Bullock. Tr. 6/30/06 at 337. Plaintiffs' trial attendance time was efficient and there should be no disallowance for the relatively small number of hours billed for multiple attorneys attending trial.

D. Multiple Attorneys at Depositions and Court Proceedings

50. Mr. Schratz also recommends a disallowance of a number of hours billed by Plaintiffs' lawyers where more than one lawyer billed for attending a deposition or court proceeding (aside from trial). Dfts. Ex. 1 at 18-19. Specifically, Mr. Schratz recommends a disallowance of 47.45 hours of Mr. Blakemore's billed time and 9.5 hours of Mr. Bullock's billed time. *Id.* However, the time expended by these two lawyers in attending these depositions and court proceedings was reasonable and should not be disallowed.

51. Ms. Quinn Cooper has opined that "in the discovery process and trial of complex lawsuits, it is frequently necessary for more than one attorney to attend depositions, hearings and trial." Plfs. Ex. 6 at 2. Specifically with regard to depositions, "the second attorney plays an important role in organization, document and exhibit management, and completeness of the examination." *Id.* With regard to hearings, Ms. Quinn Cooper states that "it may be necessary to have all attorneys present who may have played a role in any pre-hearing conversations" and to "provide the best representation to the client." *Id.*

52. As Mr. Bullock explained, when a deposition involves an important witness, it is important to have two lawyers present to assure that the right "questions get asked and that the record is clear." Tr. 6/29/06 at 55. Mr. Schratz's report shows that Plaintiffs had two lawyers present at a total of seven (7) depositions. Dfts. Ex. 1 at 17-

18. One of the depositions was of former OKAAP President Dr. Robert Wright, one of the key witnesses in the case. Four of the depositions were of key OHCA employees, including named Defendant Lynn Mitchell, all of whom gave testimony at trial which was cited by the Court in its Findings of Fact. *For example, see OKAAP II*, 366 F.Supp.2d at 1059 (Ogles), 1067 (Asmussen, identified as "OHCA's Care Management Director"), 1084 (Holt, identified as "OHCA's EPSDT Manager") and 1075 (Mitchell). Another of the depositions was of the trial deposition of Dr. Glendenning, Defendants' medical expert witness. The fact that this was a trial deposition means that it was *per se* not unreasonable for both Mr. Bullock and Mr. Blakemore to attend under Mr. Schratz's own standard. Overall, the amount of time billed by two Plaintiffs' lawyers for attendance of depositions was reasonable and should not be reduced.

53. The "more than one lawyer" hearing attendance time identified by Mr. Schratz largely includes time spent in settlement conferences and the class certification hearing. Dfts. Ex. 1 at 18-19. It was certainly not unreasonable for Plaintiffs to have both Mr. Bullock and Mr. Blakemore attend settlement discussions, as the possible settlement of such a complex and important case warrants maximum attention and representation. Further, the class certification hearing was in effect a "trial" as it was an evidentiary hearing. Therefore, it was reasonable for two attorneys to attend the class hearing. Concerning the relatively small number of hours billed by two of Plaintiffs' lawyers for attending other court proceedings, when one considers the complexity of the factual and legal issues involved in this case, it was not unreasonable for both Mr. Bullock and Mr. Blakemore to attend these hearings, and no reduction of Plaintiffs' requested fees should be imposed.

E. Clerical Work

54. Mr. Schratz has identified 150.20 hours ($11,063.25) of paralegal time billed by Plaintiffs as being "clerical" in nature. Dfts. Ex. 1 at 20. Mr. Schratz recommends a disallowance of $11,063.25 for alleged "clerical work" performed by paralegals. *Id.* at 21.

55. Mr. Schratz's opinion on the "clerical work" issue is of no use to the Court because he fails to give even one specific example of a time entry which he considers to be "clerical" in nature. Without even one concrete example of alleged "clerical" time billed by Plaintiffs, the Court cannot accept Mr. Schratz's recommendation. Mr. Schratz does not adequately explain what the supposed "clerical" time is or why it is non-compensable. Mr. Bullock has described "clerical work" as "traditional work of secretaries in terms of typing, answering the phone [and] doing filing..." Tr. 6/29/06 at 57. Mr. Bullock has further testified that his firm did not bill for clerical tasks. *Id.* at 57 and 71. Defendants have not put forth any credible evidence to the contrary.

F. Document-Related Activities

56. As noted above, the case at bar was "extraordinarily document intensive." Tr. 6/29/06 at 57. According to Ms. Quinn Cooper, in such document-intensive cases, "[i]t is not only reasonable, but vital, that a legal assistant or young lawyer review, organize, bate stamp and prepare some type of index or summary of documents." Plfs. Ex. 6 at 3. It is also Ms. Quinn Cooper's opinion that such document control time is billable. *Id.*

57. In a similar vein, Mr. Bullock testified that the document control paralegal and clerk time expended in this case was necessary:

> You can't do these [document-intensive] cases if you don't have people...who are capable of reading the documents, preparing summaries, and then creating a database that allows those documents to be recalled as they become particularly relevant. That [document control] time was essential to this case.

Tr. 6/29/06 at 58.

58. Nevertheless, Mr. Schratz has recommended that the Court disallow **"at least 60%" ($25,824.75)** of the fees which he has identified as "document-related activities." Dfts. Ex. 1 at 21-22. Once again, though, Mr. Schratz fails to point to a single specific time entry which he deems to represent an excessive or unnecessary document-related activity. Without a doubt, the document-intensive nature of this case required a great effort on the part of Plaintiffs' paralegals and clerks on document control-related activities. Defendants have failed to offer any helpful guidance as to why the time billed by Plaintiffs for document-related tasks should be disallowed. Therefore, no reduction should be imposed.

G. Conferencing

59. Mr. Bullock has characterized attorney "conferencing" as attorney communication for the purposes of resolving problems, assigning tasks, etc. Tr. 6/29/06 at 58. Mr. Bullock's firm bills for conferencing time because it is "necessary to the pursuit of the case." *Id.* at 58-9. Specifically concerning the conferencing time billed in this case, Mr. Bullock testified that the lawyers "met when necessary...and moved the case ahead." *Id.* at 59.

60. Mr. Schratz "totally agree[s] with the [P]laintiffs that conferencing is necessary." Tr. 6/29/06 at 133. Yet, Mr. Schratz still recommends that the Court disallow 25% of what he has identified as conferencing fees for a total recommended disallowance of $29,977.81 for Bullock & Bullock and $5,087.50 for PILCOP. Dfts. Ex.

1 at 22-24. Once again, however, Mr. Schratz does not provide the Court with any specific example of excessive or unnecessary conferencing. He simply comes to a conclusion, without any true factual support, that the amount of time which Plaintiffs' lawyers billed for conferencing was excessive. Such a conclusory opinion is of no real assistance to the Court.

61. Further attenuating the force of Mr. Schratz's "excessive conferencing" recommendation is the fact that he did not limit the identified conferencing time to conferences between Plaintiffs' lawyers. As footnote 9 of his report points out, Mr. Schratz's characterization of "conferencing" time extends to "phone calls and meetings...with opposing counsel, third parties, client[s], etc." Dfts. Ex. 1 at 23, n. 9. Yet, Mr. Schratz's testimony about conferencing was not clear as to whether the average to which he was comparing the ratio of conferencing to total work performed included such conferences outside the circle of Plaintiffs' counsel. Tr. 6/29/06 at 133. Moreover, specifically with regard to PILCOP, given the role of PILCOP in general, and Mr. Gilhool (who billed more than 60% of PILCOP time) in particular, even Mr. Schratz seemed grudgingly to admit that it is not surprising that PILCOP's "conferencing" time would be higher than the averages his study of cases produces. Tr. 6/29/06 at 208. Under all these circumstances, Mr. Schratz's testimony did not demonstrate the unreasonableness of Plaintiffs' requested time which he characterized as "conferencing," and the Court should not disallow any of this "conferencing" time.

H. "Legal Research"

62. Mr. Schratz claims generally that he has identified 365.45 hours and $75,038.75 billed by Bullock & Bullock and 54.70 hours and $19,145.00 billed by

PILCOP for miscellaneous attorney research. Dfts. Ex. 1 at 24. Mr. Schratz further identifies two specific examples of what he believes to be excessive attorney time spent on two motions: (1) the 158.60 hours ($55,510.00) billed by Mr. Gilhool in responding to Defendants' Motion to Dismiss; and (2) the 98.95 hours ($14,126.25) billed by Plaintiffs' lawyers in preparing a Motion for Partial Summary Judgment. Dfts. Ex. 1 at 24-6. Based upon unspecified "case management and billing judgment" concerns, Mr. Schratz recommends that the requested Bullock & Bullock legal research fees be reduced by 20% ($12,198.25) and that all fees incurred preparing the Motion for Partial Summary Judgment should be disallowed in their entirety. *Id.* at 26. Mr. Schratz further recommends a 20% disallowance ($7,930.00) of the fees billed by Mr. Gilhool in opposing the motion to dismiss and a 20% disallowance ($2,735.00) of the fees billed by PILCOP for legal research.

63. Once more, as is his practice, Mr. Schratz is long on conclusions and short on supporting facts. In relation to his general recommendation of a 20% disallowance of legal research time, Mr. Schratz does not supply any specific illustration of excessive or unnecessary legal research time which was billed by Plaintiffs' counsel. Considering the fact that Mr. Schratz did not even know what Title XIX was at the time of the fee hearing, he is in no position to say whether the time spent in researching the complex legal issues involved in this case was excessive, especially without any explanation or supporting facts. One need only read the Court's Conclusions of Law in this case to see the complicated nature of the statutory provisions, regulations and cases involved here. Defendants have given the Court no good reason to impose any reduction of the legal research fees, let alone the sweeping 20% reduction recommended by Mr. Schratz.

64. Further, the record shows that the time expended by Mr. Gilhool in responding to the motion to dismiss was not excessive or otherwise unreasonable. As part of their Motion to Dismiss, Defendants relied upon an attached copy of the decision dismissing the complaint of plaintiffs in *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich 2001). *Westside Mothers* was a children's Medicaid class action in Michigan for which Mr. Gilhool had been one of the counsel. The *Westside Mothers* decision raised a number of novel uses of law, which, if followed by the Court in the case at bar, could have been fatal to Plaintiffs' claims. Tr. 6/30/06 at 305. It was, therefore, a logical, efficient use of resources for Mr. Gilhool, rather than Mr. Bullock, to take the laboring oar in preparing Plaintiffs' (ultimately successful) opposition to Defendants' Motion to Dismiss. Tr. 6/30/06 at 306-308.

65. In support of his recommendation to disallow 20% of the hours expended by Mr. Gilhool in responding to the Motion to Dismiss, Mr. Schratz notes that Mr. Gilhool billed in excess of 10 hours on multiple days including one day with as much as 15 hours. Dfts. Ex. 1 at 24-5. There was testimony at the fee hearing by Mr. Eiseman concerning Mr. Gilhool's extraordinary abilities and working habits (Tr. 6/30/06 at 245-246) which overcomes the inference which Mr. Schratz attempts to draw concerning the amount of time spent by Mr. Gilhool on Plaintiffs' successful answer to the Motion to Dismiss. Yet again, with no real appreciation of the legal issues at play, Mr. Schratz's opinion that the time expended by Mr. Gilhool was excessive is of minimal weight.

66. Mr. Schratz's primary justification for recommending a total disallowance of the fees incurred for drafting the Motion for Partial Summary Judgment is that the Motion was voluntarily withdrawn by Plaintiffs. Dfts. Ex. 1 at 25. Plaintiffs filed for

partial summary judgment on the claims upon which they ultimately prevailed. Tr. 6/29/06 at 60-2. Plaintiffs only withdrew the Motion after Defendants' repeated failures to file a timely response and after it became clear that Defendants were attempting to delay the trial date on the basis that the Motion had not yet been ruled on. *Id.* Under these circumstances, there is no valid basis to disallow the fees incurred in relation to the Motion for Partial Summary Judgment.

I. Press Coverage

67. Mr. Schratz also asks the Court to disallow all fees ($1,335.00) billed by Mr. Bullock, Mr. Blakemore and paralegal Nadine Hodge for "press coverage after the verdict." Dfts. Ex. 1 at 26. It has always been the Bullock firm's practice to bill for press coverage time because so many of the firm's cases, including the case at bar, have been high profile public policy cases. Tr. 6/29/06 at 62. As Mr. Bullock sees it, he has an obligation in these cases to "give the press an understanding of [his] client's perspective." *Id.* As Mr. Bullock noted, he has been awarded press coverage fees in every other civil rights case he has brought. *Id.* In these unique public policy cases, dealing with the press is part of the lawyer's job, and time spent dealing with the press is reasonably expended. Consequently, the time expended by the Bullock firm for press coverage should not be disallowed in this case.

FEES BILLED FOR PREPARATION OF THE MOTION FOR ATTORNEYS FEES

68. As identified by Mr. Schratz, Plaintiffs billed 98.05 ($8,712.75) for preparation of the Motion for Fees. Dfts. Ex. 1 at 28. Of those 98.05 hours, 78.60 hours were billed by paralegal Betty deJong, largely in connection with updating the fee application attachments. *Id.* Mr. Schratz claims first that the amount of time spent on

preparing the Motion for Fees was excessive. *Id.* Secondly, Mr. Schratz asserts that the time spent by Ms. deJong in updating the fee application attachments tends to show that Plaintiffs' lawyers did not keep their time records in a contemporaneous manner. *Id.* In light of these concerns, Mr. Schratz recommends a 70% reduction ($5.783.58) in the fees billed by the Bullock firm in preparing the Motion for Fees. *Id.* at 29.

69. Preparation of the Motion for Fees was overseen and supervised by Mrs. Bullock. Tr. 6/30/06 at 329. At the fee hearing, Mrs. Bullock explained the process of preparing the Motion for Fees and the practice of the Bullock firm in keeping time records:

> There are 350 pages of time entries and expense entries that were submitted to this court which is a huge fee request. And...the billing process at our office was we do contemporaneous timekeeping.[4]
>
> ***
>
> Each month the staff would enter [the time records] into the computer...[However,] no time [in connection with the Motion for Fees] is really billed until August of 2004 where...[Ms.] DeJong's first entry is review status of the fee request exhibits. Because at that point we had finished with our [proposed] findings [of fact] and...the local rules require [that the Motion for Fees] be filed quickly.
>
> ***
>
> The staff prepared the exhibits, got that organized as to what went to the bill of costs and how to designate all of those kinds of things. And I personally reviewed our time and entries at least three times...

Id. at 329-30. Mrs. Bullock further explained that a significant amount of her time in reviewing the billing statements was spent in deleting time by entering "no charge." *Id.* at 330.

70. Considering the size of the fee request, documentation and time which had elapsed from filing of the Complaint to filing of the Motion for Fees, the time expended

[4] Mr. Bullock also testified that his firm's time is contemporaneously kept. Tr. 6/29/06 at 63-4.

in preparing the Motion for Fees is not unreasonable. Further, in light of the testimony, it seems clear that the Bullock firm's time records were contemporaneously kept.

XOLAIR

71. On October 5, 2004, plaintiffs filed a Motion for Supplemental Relief and Request for Preliminary Injunction. *OKAAP II*, 366 F.Supp.2d at 1054. The motion requested that the Court enjoin Defendants from denying coverage for the anti-immunoglobulin E ("IgE") drug Xolair (the trade name for omalizumab) to six class members suffering from elevated IgE-related symptoms and whose physicians determined Xolair to be medically necessary for them. *Id.* Plaintiffs specifically alleged that by denying Xolair to these children, Defendants were in violation of the necessary treatment aspect of the EPSDT provisions by failing to provide Xolair for these class members. *Id.* at 1114. Under 42 U.S.C. § 1396d(r)(5), Defendants must assure that all EPSDT-eligible recipients under age twenty-one (21) receive such medically necessary health care treatment "to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State Plan" which includes medications.

72. The Court held a hearing on October 29 and November 1, 2004 to address this Xolair issue. *OKAAP II*, 366 F.Supp.2d at 1054. The Court ordered additional medical evaluations and held an additional hearing on January 4, 2005. *Id.* While the Xolair issue was pending, Defendants voluntarily agreed to approve Xolair for one of the six class members. *Id.* at 1096. The parties submitted proposed findings of fact and conclusions of law regarding the Xolair issue on January 18, 2005. *Id.*

73. The Court consolidated the Xolair issue with the decision on the case-in-chief. *OKAAP II*, 366 F.Supp.2d at 1114-17. The Court ultimately held that Defendants' "reliance on the FDA's approval statement in limiting coverage of Xolair to children over the age of 12 was a reasonable exercise of its discretion to place limitations on covered services based on medical necessity and utilization controls," and denied Plaintiffs' requested relief. *Id.* at 1117. Nonetheless, the Xolair issue involved legal theories related to all of Plaintiffs' other legal theories and the common fact pattern of children being denied necessary care as required by federal law.[5]

ISSUES OF CREDIBILITY AND MR. SCHRATZ

74. Aside from the fact that Mr. Schratz has little pertinent expertise in the areas of Oklahoma market rates, class actions or Title XIX litigation, there are also serious questions as to Mr. Schratz's credibility as a witness generally. As set out in Plaintiffs' Motion to Strike Rule 26 Affidavit of James Schratz ("Motion to Strike"), Dkt. #437, Mr. Schratz failed to disclose at least five cases in which he had given expert testimony over the past four years in clear violation of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. In each one of the cases he failed to disclose, his opinions were either completely or partially rejected. Mr. Schratz attempted to justify his knowing failure to disclose these cases based upon a strained interpretation of the meaning of the word "testimony" as that word is used in the Rule. In any event, Mr. Schratz's knowing

[5] After independent review, Plaintiffs do not dispute Mr. Schratz's finding that the "Bullock timekeepers billed $99,757.00 in fees" on the Xolair issue. Dfts. Ex. 1 at 27. Plaintiffs do, however, dispute Ms. Rambo-Jones' alleged finding of $113,000 in fees which Plaintiffs' lawyers billed on the Xolair issue. Tr. 6/30/06 at 319. Defendants should not be permitted to rely on Ms. Rambo-Jones' argument in this regard as they have offered expert testimony on the issue, as Ms. Rambo-Jones' figure does not conform with the findings of Plaintiffs or Mr. Schratz, and as Ms. Rambo-Jones offered no evidentiary support for her finding.

failure to disclose these cases to the Court calls into question his credibility as an expert witness.

EXPENSES/COST ITEMS

75. Plaintiffs' Motion for Fees also includes a request for reasonable expenses. Plfs. Ex. 1. Specifically, Plaintiffs seek recovery of the following expenses:

Bullock & Bullock Expenses Sought:

B&B Legal Ass'ts and Clerks	Hours Expended	Amount Sought	Subtotal Amt. Sought	TOTAL B&B LEGAL ASS'T AND CLERK EXP. SOUGHT
N. Hodge	774.80	$75.00	$58,110.00	
B. deJong	503.85	75.00	37,788.75	
K. Barker	186.05	35.00	6,511.75	
A. Bowline	135.90	35.00	4,756.50	
C. Wagner	5.00	35.00	175.00	
J. Fitzgerald	140.00	35.00	4,900.00	**$112,242.00**

B&B Other Expenses	Amt. Sought	TOTAL B&B OTHER EXP.
Postage, shipping and courier	$ 2,393.99	
Copying, reproduction and printing	39,958.54	
Long distance and phone conference expenses	710.95	
Court reporters	8,734.79	
Electronic research	3,959.38	
Filing fees	250.00	
Process service expenses	675.00	
Attorney and staff travel and lodging expenses	1,719.30	
Witness travel and lodging expenses	2,920.08	**$ 61,322.03**

PILCOP Expenses Sought:

Time Period / Description	Amt. Sought	TOTAL PILCOP EXP. SOUGHT
Jan. – Dec. 2001: Copies, fax, overnight delivery, postage, telephone/long distance	$1,188.19	
Jan. 2002 – Mar. 2003: Copies, fax, overnight delivery, postage, telephone/long distance	650.27	
Apr. 2003 – Sept. 2004: Copies, fax, overnight delivery, postage, telephone/long distance, travel	3,471.75	
Oct. 2004 – June 2005: Copies, fax, postage, telephone/long distance	445.68	**$ 5,755.89**

Plfs. Ex. 2. Plaintiffs have attached an itemized statement of the Bullock firm expenses as Ex. A-2 to the Motion for Fees. Plfs. Ex. 1 (Ex. A-2).

76. As noted above, the Court Clerk issued an Order on Bill of Costs on October 5, 2005 against Defendants in the amount of $25,038.08. Dkt. #346. On January 26, 2006, the Court entered an Order and Opinion on Plaintiffs' Motion for Judicial Review of the Court Clerk's Order on Bill of Costs (Dkt. #347), and ordered that Defendants pay Plaintiffs an additional $985.43 in costs. Dkt. #372. Defendants subsequently appealed these costs Orders. Therefore, Plaintiffs continue to seek recovery of all expenses, including items sought in the Bill of Costs, as part of the Motion for Fees. Mr. Bullock made it clear at the fee hearing that Plaintiffs do not expect to have a double recovery, but merely to be made whole, whether it be through the Bill of Costs or the Motion for Fees.

A. Bullock Firm Expenses

1. Paralegal and Clerk Fees

77. Defendants do not contest the reasonableness of the hourly rates which Plaintiffs seek for the paralegals and clerks in this case. As noted above, Mr. Schratz has recommended that certain fees billed by the paralegals be disallowed as excessive or clerical in nature. As established above, Mr. Schratz's recommendations in this regard are not well-founded. Therefore, again, no reduction of the paralegal and clerk fees sought by Plaintiffs is called for.

2. In-House Photocopying Expenses

78. Mr. Schratz has criticized the 20 cents per copy which has been charged by Plaintiffs for in-house photocopies and recommends that the per copy charge be

reduced to 10 cents. Dfts. Ex. 1 at 30. Plaintiffs have no objection to reducing the per copy charge to 10 cents. Tr. 6/29/06 at 67. Therefore, the in-house copying expenses sought by Defendants should be reduced from $17,401.93 to $8,700.97.

3. Westlaw Computer Research

79. In his Report, Mr. Schratz opines that "[i]n order to accurately evaluate the reasonableness of the Westlaw charges, the [Bullock] firm should provide an explanation of its Westlaw schedule, including actual rates paid." Dfts. Ex. 1 at 31. Mrs. Bullock provided a satisfactory explanation of the Westlaw schedule and rates paid at the fee hearing. Tr. 6/30/06 at 332-36; Plfs. Ex. 25. The Westlaw fees should not be reduced.

4. Word Processing

80. Mr. Schratz claims that the Bullock firm seeks $2,014.75 in "word processing" expenses. Dfts. Ex. 1 at 31. However, Mr. Schratz does not point to any particular item on Plaintiffs' expense statement as being a "word processing" item. Mr. Bullock testified at the fee hearing that his firm does not bill for "word processing." Tr. 6/29/06 at 71. Indeed, there does not appear to be any "word processing" charge contained in Plaintiffs' itemized expense statement. As such, Plaintiffs should not have their claimed expenses reduced.

B. PILCOP Expenses

81. As noted, Plaintiffs' Motion for Fees seeks a total of $5,755.89 in costs and expenses incurred by PILCOP in connection with its participation in the case at bar, of which $2,726.74 is for "travel" and the balance of $3,029.15 is for copies, fax, overnight delivery, postage and long distance telephone. *See* pages 25-28 of Exhibit B to

Plfs. Ex. 1. Mr. Schratz proposes that the Court disallow these PILCOP expenses in their entirety for lack of documentation. Dfts. Ex. 1 at 31.

82. Pages 25-28 of Exhibit B to the Motion for Fees sets forth separately by category among copying, fax, overnight delivery service, postage and long distance telephone charges, the amounts claimed as PILCOP out-of-pocket expenses for each of the following time periods:

1/11/01 - 12/31/01
1/1/02 - 3/31/03
4/1/03 - 9/30/04
10/1/04 - 6/30/05

The amount of $3,029.15 in total expenses for a four and a half (4½) year period in which the lawyers spent 565.6 hours does not seem unreasonable. The amount of $3,029.15 is less than 2% of the $169,760.00 which Plaintiffs are seeking to recover for PILCOP attorney's time. Plaintiffs are not required, in the circumstances, to submit further substantiation of these copying, fax, overnight delivery service, postage and long distance telephone charges.

83. As for the $2726.74 for PILCOP's travel expenses, Plaintiffs have provided ample explanation and documentation. At the fee hearing, Plaintiffs marked Exhibit 24, which was explained by Mr. Eiseman, and admitted it into evidence. Tr. 6/30/06 at 256-62. The first page of Plaintiffs' Exhibit 24 prepared by Mr. Eiseman details the breakdown of the travel expenses. The next three pages of Exhibit 24, as Mr. Eiseman testified, were submissions he contemporaneously made to PILCOP's comptroller to be reimbursed for airfare and other transportation expenses of the first three of his five trips totaling $728.39. The last pages of Plaintiff's Exhibit 24 are the bills for $684.97 and $779.79 rendered by Tulsa's Adams Mark Hotel for Mr. Eiseman's

lodging, meal and parking expenses during the first two weeks of trial in April 2004, which Mr. Eiseman testified were paid not by PILCOP or himself, but by Plaintiff, OKAAP. These categories of travel expenses, which total $2,193.15, have been properly substantiated and are reasonably related to PILCOP's representation of Plaintiffs herein.

CONCLUSIONS OF LAW

THE CIVIL RIGHTS ATTORNEY'S FEE ACT

84. The Plaintiffs seek fees and expenses under 42 U.S.C. § 1988, also known as the Civil Rights Attorney's Fee Act. In pertinent part, 42 U.S.C. § 1988 provides that "[i]n any action or proceeding to enforce a provision of section[]...1983...of this title...the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs..." The Supreme Court has determined that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983) (citation omitted) (footnote omitted); *Newman v. Piggie Park Enters. Inc.,* 390 U.S. 400, 402 (1968).

PLAINTIFFS ARE THE "PREVAILING PARTY" FOR THE PURPOSES OF AN AWARD OF FEES

85. Plaintiffs are clearly the "prevailing party" for purposes of entitlement to an award of reasonable attorney fees and costs. In *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources,* 532 U.S. 598, 604 (2001), the Supreme Court held that in order to "prevail" for the purposes of an award of attorneys fees, the plaintiff must achieve some "'material alteration of the legal relationship of the parties'" or a "court ordered 'chang[e][in] the legal relationship between [the plaintiff] and the defendant'" (quoting *Tex. State Teachers Ass'n v. Garland Indep. School Dist.,*

489 U.S. 782, 792 (1989)).[6] As examples, the Court pointed to "enforceable judgments on the merits and court-ordered consent decrees" as creating the necessary "material alteration" to render a plaintiff the "prevailing party." *Buckhannon*, 532 U.S. at 604. Furthermore, in order to be rendered the "prevailing party," a plaintiff need not succeed on every claim but need only show success on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted) (emphasis provided).

86. As noted above, this Court has already concluded that "Plaintiffs...succeeded on the ***most* significant** issues in the litigation and achieved a significant part of the relief they sought in bringing suit." Opinion and Order, 7/5/05, at 2 (Dkt. 320) (emphasis added). The Final Judgment and Permanent Injunction is an "enforceable judgment on the merits" which creates the requisite "material alteration of the legal relationship" between the parties. Indeed, Defendants concede that Plaintiffs have prevailed. In sum, Plaintiffs have clearly prevailed for the purposes of an award of fees.

I. THE LODESTAR CALCULATION

87. In determining the reasonableness of a fee request, the Court should first calculate the "lodestar amount" of the fee. *Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998) (citations omitted). "The lodestar calculation is the product of the

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[6] While the claims at issue in *Buckhannon* involved the "prevailing party" provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act, the Court's analysis of the meaning of "prevailing party" was general. Several Courts have held that *Buckhannon* applies broadly to fee-shifting statutes that employ the "prevailing party" language, including 42 U.S.C. § 1988. *See, e.g., Richardson v. Miller*, 279 F.3d 1, 4 (1st Cir.2002); *New York State Fed. of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Comm'n.*, 272 F.3d 154, 158 (2d Cir.2001); and *Cody v. Hillard*, 304 F.3d 767, 773, n. 8 (8th Cir. 2002).

number of attorney hours 'reasonably expended' and a 'reasonable hourly rate.'" *Robinson*, 160 F.3d at 1281 (citations omitted). "'Once an applicant for a fee has carried the burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be a reasonable fee as contemplated by Section 1988.'" *Id.* (internal quotation from *Cooper v. Utah*, 894 F.2d 1169, 1171 (10th Cir. 1990)).

A. Number of Attorney Hours Reasonably Expended

1. Generally

88. There are several specific steps that a district court must take in determining the number of hours reasonably expended. In *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir.1983), *disapproved of on other grounds by Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), the Tenth Circuit indicated that a party claiming attorney fees must be prepared to establish the hours expended by the attorneys by means of contemporaneous time records if requested by the trial court. The Plaintiffs have already provided the Court with such time records. *See* Plfs. Ex. 1 (Ex. A-1 and B-2). Consistent with the holding in *Ramos*, the time records which Plaintiffs have submitted to the Court: are meticulous, identify the nature and subject matter of the work performed and identify the hours spent on each specific task. *Ramos*, 713 F.2d at 553.

89. Once the Court has adequate time records before it, it must ensure that the prevailing attorneys have exercised "'billing judgment.'" *Id.* (quoting *Copeland v. Marshall*, 641 F.2d 880, 901 (D.D.Cir. 1980)). "Billing judgment consists of winnowing the hours actually expended down to the hours reasonably expended." *Case v. Unified School District No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998) (citing *Ramos* at 553). The

Tenth Circuit has further defined the "billing judgment" standard by stating that "[h]ours that an attorney would not properly bill to his or her client cannot reasonably be billed to the adverse party, making certain time presumptively unreasonable." *Case*, 157 F.3d at 1250. Here, as set out in the above Findings of Fact, Plaintiffs' counsel have exercised billing judgment by only billing those hours which were reasonably expended. Furthermore, the specific tasks which Plaintiffs' lawyers billed were all chargeable tasks. Contrary to Defendants' arguments, and as demonstrated in the Findings of Fact above, there is nothing in Plaintiffs' fee request which suggests unreasonableness or excessiveness in the hours billed.

90. After determining whether the tasks the attorneys billed for are chargeable, the district court "should look at the hours expended on each task to determine if they are reasonable." *Case*, 157 F.3d at 1250. As the Tenth Circuit instructed in *Ramos*:

> In determining what is a reasonable time in which to perform a given task or to prosecute the litigation as a whole, the court should consider that what is reasonable in a particular case can depend upon factors such as the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side.
>
> Another factor the court should examine in determining the reasonableness of hours expended is the potential duplication of services…

Ramos at 554 (quoting *Copeland*, 641 F.2d at 891). The district court may also reduce the hours awarded if "'the number [of compensable hours] claimed by counsel include[s] hours that were unnecessary, irrelevant and duplicative.'" *Case*, 157 F.3d at 1250 (quoting *Carter v. Sedgwick County, Kan.*, 36 F.3d 952, 956 (10th Cir. 1994)). The evidence presented proves that, even when considering the objections raised by Defendants as to particular tasks, the hours billed by Plaintiffs' counsel are reasonable

and compensable. Furthermore, no deduction of the number of these compensable hours is warranted as being unnecessary, irrelevant or duplicative.

2. The Complexity of the Case

91. As noted, the Court in *Ramos* instructed that in determining whether the time spent on the litigation was reasonable, the Court should consider the "complexity of the case." *See Ramos*, 713 F.2d at 554. As demonstrated above in the Findings of Fact, Plaintiffs have proven that the case at bar was perhaps *the most* complex case of its kind in the history of Title XIX litigation. Plaintiffs offered the opinions and testimony of a true expert in the area of Title XIX litigation, Professor Sara Rosenbaum. Ms. Rosenbaum's testimony, coupled with Mr. Bullock's testimony, clearly showed the intricate and highly complex nature of the legal claims, factual issues and proof which had to be presented in order for Plaintiffs to succeed. The patent complexity of this case helps explain the hours expended by Plaintiffs' counsel and supports the Court's conclusion that the hours billed were reasonable.

3. The Results Achieved

92. Defendants, through Mr. Schratz, argue that Plaintiffs' fee award should be significantly reduced because they did not prevail on all claims for relief. However, in *Hensley*, the Supreme Court pertinently instructs that:

> [i]n...cases [in which] the plaintiff's claims for relief...involve a **common core of facts or [are] based on related legal theories[,]**...[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. **Such a lawsuit cannot be viewed as a series of discrete claims.** Instead the district court should focus on the **significance of the overall relief obtained** by the plaintiff in relation to the hours reasonably expended on the litigation.

Hensley, 461 U.S. at 435 (emphasis provided). This aspect of the *Hensley* opinion has been consistently upheld by the Tenth Circuit. *See, e.g., Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088, 1103-04 (10thCir. 2005); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1120 (10thCir. 2001).

93. Defendants have mounted no discernable argument that Plaintiffs' claims, as presented during trial in April-May of 2004, do not involve a common core of facts or are not based on related legal theories. All of the legal claims at trial involved provisions of Title XIX and, more particularly, were related to the provision of medical care to Medicaid-eligible children. With the exception of the Xolair issue, Mr. Schratz does not even attempt to divide the hours expended by Plaintiffs' counsel on each separate claim. This is because such an exercise would be futile. All of the claims for relief, including the Xolair claim, fall under one common factual and legal theme: securing access to necessary health care services for Oklahoma's Medicaid children. Therefore, for the purposes of determining the reasonableness of the hours expended by Plaintiffs' counsel, the Court must focus on the significance of the relief obtained.

94. In considering the evidence presented as to the overall significance of the relief obtained, the Court concludes that Plaintiffs are entitled to a fully compensatory fee for obtaining "excellent results." *Hensley*, 461 U.S. at 435. In *Hensley*, the Supreme Court held that:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.[7]

[7] This answers the question posed by the Court of whether the law permits an enhanced fee where the prevailing party has achieved excellent results.

The Tenth Circuit has held that the "most critical factor" in determining the amount of fees to be awarded to a prevailing civil rights plaintiff is "the degree of success obtained." *Ramos v. Lamm*, 713 F.2d 546, 556 (10thCir. 1983) (quoting *Hensley*, 461 U.S. at 435). "'The result is what matters.'" *Robinson v. City of Edmond*, 160 F.3d 1275, 1283 (10thCir. 1998) (internal quotation from *Hensley*, 461 U.S. at 435).

95. There is no evidence in the record that the results obtained by Plaintiffs are anything other than excellent. Indeed, the results obtained here appear to be truly unique in scope. As demonstrated above, the Court ordered an across-the-board increase in Medicaid provider reimbursement rates to the equivalent of 100% of Medicare. This is an increase of over 25% for most Medicaid rates. Plaintiffs' expert Ms. Rosenbaum is not aware of any other EPSDT case in which the court ordered, even on an interim basis, such an across-the-board increase in Medicaid provider reimbursement rates. Plfs. Ex. 5 at 24. The increased provider rates are aimed at increasing provider participation in Oklahoma's Medicaid program and, thus, improving access to health care services for Oklahoma's Medicaid children.

96. The Court also ordered Defendants to perform a comprehensive rate study, which is also unique in the history of Title XIX litigation. Plfs. Ex. 3 at 18.; Plfs. Ex. 5 at 21-3. If properly implemented by Defendants, this rate study will result in a better understanding of the access to care problems in Oklahoma and could result in further relief. The results obtained by Plaintiffs are excellent, and they should be awarded a fully compensatory fee as a result.

4. Specific Objections Raised by Defendants

97. As shown in the Findings of Fact, Defendants, through Mr. Schratz, recommend large reductions in Plaintiffs' requested fees based upon arguments that certain aspects of the fees requested are unreasonable, excessive or show a lack of billing judgment. As stated and explained above, the Court rejects these recommendations. Further explanation as pertaining to any applicable legal issues is set out below.

a. Minimum Billing Increment

98. The Court is unaware of any legal prohibition placed upon quarter hour increment billing. Furthermore, the minimal amount of quarter hour increment billing identified by Mr. Schratz does not raise any concerns as to billing judgment or unreasonable hours billed. No disallowance of fees should be imposed for quarter hour increment billing.

b. Trial Preparation Activities

99. As the *Ramos* Court recognized, "[d]uring trials and other times of unusual stress the number of billable hours no doubt increases considerably." *Ramos*, 713 F.2d at 553. Preparing for a trial of such complexity and magnitude as the trial in this case is no doubt a time of "unusual stress" for the attorneys involved. Mr. Schratz complains that the ratio of time spent in trial preparation, allegedly 10-to-1, was excessive. However, the Court is unaware of any legal precedent which stands for the proposition that such a ratio is *per se* excessive, and Plaintiffs have offered ample explanation of the hours spent in trial preparation. As set out in the Findings of Fact, Plaintiffs have established that the trial preparation time billed was reasonable and,

indeed, necessary to the successful outcome. No disallowance is warranted for excessive trial preparation time.

c. Multiple Attorneys at Trial

100. The presence of two or less lawyers during trial requires no justification to the Court. *Ramos*, 713 F.2d at 554, n. 4. The evidence shows that, out of 19 trial days, Plaintiffs had more than two lawyers present only six days, and Mr. Eiseman examined witnesses on four of those six days. As demonstrated in the Findings of Fact above, Plaintiffs have adequately explained the number of attorneys who attended trial. Considering the complexity of the case and accepted practices in the Tulsa community, the trial attendance time is fully compensable and not duplicative. *See Ramos* at 554.

d. Multiple Attorneys at Depositions and Court Proceedings

101. The Tenth Circuit has stated that the presence of more than one attorney at depositions or hearings "must be justified to the court." *Ramos*, 713 F.2d at 554, n. 4. Plaintiffs' expert Ms. Quinn Cooper has opined that "in the discovery process and trial of complex lawsuits, it is frequently necessary for more than one attorney to attend depositions, hearings and trial." Plfs. Ex. 6 at 2. Plaintiffs have presented evidence that it is accepted and common practice for more than one attorney to attend depositions if the witness is sufficiently important. As shown above, all of the depositions which Mr. Bullock and Mr. Blakemore both attended involved important and key witnesses. All of these witnesses, with the exception of Daniel Sorrels, gave testimony which was relied on by the Court in arriving at its decision on the merits. Therefore, Plaintiffs have sufficiently justified having two lawyers present at these depositions.

102. Plaintiffs have further shown that most of the hours billed by more than one lawyer at the same "hearings" involved settlement conferences and the class certification hearing. Dfts. Ex. 1 at 18-19. It was reasonable for Plaintiffs to have two lawyers attend these pivotal events. Further, considering the complexity of the factual and legal issues involved in this case, it was not unreasonable for both Mr. Bullock and Mr. Blakemore to bill for time attending other hearings. It was important for both of these lawyers to keep abreast of the court proceedings as lead lawyer and primary associate. The Court concludes that Plaintiffs have provided adequate justification for these hours as required by *Ramos*.

e. Clerical Work

103. "The district court must determine whether law clerk and paralegal services are normally part of the office overhead in the area, and thus already reflected in the normal area billing rate the court has established in the case." *Ramos*, 713 F.2d at 558. As shown in the Findings of Fact, Plaintiffs claim that they do not bill for clerical work. While Mr. Schratz argues that Plaintiffs have billed for clerical tasks, he fails to offer the Court even one concrete example of a clerical time entry. Mr. Schratz does not adequately explain what the supposed "clerical" time is or why it is non-compensable. Such unsupported opinions are of no use to the Court. No reduction for "clerical work" is warranted.

f. Document-Related Activities

104. The Court similarly rejects Defendants' recommendation of a disallowance for excessive document-related activities. The record is clear that firms routinely bill paralegal time for document control activities in document-intensive cases

such as the case at bar. Yet, Mr. Schratz fails to point to a single specific time entry which he deems to represent an excessive or unnecessary document-related activity. Plaintiffs have established that the requested fees for document control activities are reasonable.

g. Conferencing

105. With regard to conferencing time, as with other specific tasks, a prevailing plaintiff "has the burden of proving its fee entitlement by presenting to the district court time records that show how billed hours were allotted to specific tasks." *Case,* 157 F.3d at 1253. Plaintiffs' fee request satisfies this test. Further, as shown in the Findings of Fact, the time expended on conferencing was reasonable. Defendants only offer conclusory and unsubstantiated opinion evidence to the contrary. No reduction is warranted for excessive conferencing.

h. "Legal Research"

106. For the reasons stated in the Findings of Fact above, the Court concludes that the amount of time billed by Plaintiffs for legal research is reasonable and fully compensable. The legal issues in this case are highly complex and rapidly evolving, and the Court does not find any excess in the number of hours spent on research.

107. Also, contrary to Mr. Schratz's recommendation, the Court specifically concludes that the hours spent on the withdrawn Motion for Partial Summary Judgment are compensable and should not be disallowed. The Tenth Circuit has held that even in a case where "plaintiffs ultimately did not prevail in their efforts to secure a contempt order [through a motion for contempt, it] does not divest them of their status as prevailing

parties so long as the work done was necessary to the overall effort." *Joseph A. v. New Mexico Dept. of Human Services*, 28 F.3d 1056, 1060 (10thCir. 1994).

108. Here, the record shows that Plaintiffs filed for partial summary judgment on the claims on which they ultimately prevailed, and that they only withdrew the Motion after Defendants' repeated failures to file a timely response and after it became clear that Defendants were attempting to delay the trial date on the basis that the Motion had not yet been ruled on. Under these circumstances, the preparation of the Motion, and its withdrawal were "necessary to the overall effort."

109. The evidence also supports Plaintiffs' claim that the time expended by Mr. Gilhool on Plaintiffs' *successful* opposition to Defendants' Motion to Dismiss was reasonable, and the Court will not reduce these hours as recommended by Mr. Schratz.

i. Press Coverage

110. The Tenth Circuit has never determined whether time spent by a prevailing plaintiff's lawyer in press-related activities is compensable. The Ninth Circuit, however, has long held that prevailing civil rights counsel are entitled to fees for "'press conferences and performance of other...public relations work'" when those efforts are "'directly and intimately related to the successful representation of the client.'" *Gilbrook v. City of Westminster*, 177 F.3d 839, 877 (7thCir. 1999) (quoting *Davis v. City and County of San Francisco*, 976 F.2d 1336, 1545 (9thCir. 1992), vacated in part on other grounds, 984 F.2d 345 (9thCir. 1992). The Eighth Circuit permits recovery of media-related fees where necessary to accomplish the goals of the litigation. *Jenkins v. Missouri*, 131 F.3d 716, 721 (8th Cir.1997).

111. In cases such as the case at bar where implementation of the remedy depends on political considerations, it is not unreasonable to bill for press-related time. The small number of hours billed as press-related time here was billed after the verdict which directly and intimately aided the representation of Plaintiffs in terms of educating the public, including the Legislature.

j. Hours Spent in Preparing Motion for Fees

112. It is well established, as a matter of binding precedent, that reasonable fees and expenses are compensable under 42 U.S.C. § 1988 for work expended in seeking fees. *See Hernandez v. George*, 793 F.2d 264, 269 (10thCir. 1986); *Littlefield v. Deland*, 641 F.2d 729, 733 (10thCir. 1981); and *Love v. Mayor of Cheyenne*, 620 F.2d 235, 237 (10thCir. 1981). As stated in *Hernandez*, "[c]ompensating attorneys for work in resolving the fee issue furthers the purpose behind the fee authorization in § 1988 which is to encourage attorneys to represent indigent clients and to act as private attorneys general in vindicating federal civil rights policies." *Hernandez*, 793 F.2d at 269 (citation omitted).

113. Defendants do not argue that the fees incurred by Plaintiffs' counsel in connection with the Motion for Fees are not compensable, but that the time spent in preparing the Motion, especially the time spent by paralegal Betty DeJong, was excessive. In *Case*, the district court refused to reimburse the prevailing plaintiffs for any time spent preparing motions pertaining to attorney fee recovery. The district court so refused based upon its conclusion that the time expended on the motion for fees, "roughly eighty hours," was excessive. *Case*, 157 F.3d at 1254-55. In rejecting the district court's conclusion that the requested time expended on the motions for fees warranted a punitive reduction, the *Case* Court reasoned:

> The eighty hours were used to write a twenty-five page memorandum in support of their motion for attorney's fees, prepare seven lengthy attorney affidavits, copy four cases from Westlaw for submission to the district court, and compile almost 200 pages of raw billing statements and twenty-eight pages of descriptions of various billing deductions for media-related activities and unsuccessful claims. In total, the fee request and supporting documents were almost 400 pages long. **It would be inappropriate to conclude that spending eighty hours on a fee request of this magnitude is outrageously unreasonable or excessive.**

Id. (emphasis provided).

114. Here, Plaintiffs' lawyers and paralegals spent approximately 98 hours preparing the Motion for Fees and attachments. The evidence shows that the Motion for Fees involved approximately **350 pages** of time entries and expense entries, spanning a period of four years, which had to be reviewed and winnowed down. Considering the sheer size of the documentation associated with the fee request, the amount of time expended in preparing the Motion for Fees and attachments was reasonable.

B. Hourly Rates

115. In setting the hourly rate, the Court must determine what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time. *Ramos*, 713 F.2d at 555. The objective of this analysis is to arrive at prevailing market rates for counsel's services. A reasonable fee in civil rights cases is calculated according to prevailing market rates. *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

116. In the case of public interest counsel, a reasonable rate is generally the rate charged by an attorney of like "skill, experience, and reputation." *Blum,* 465 U.S. at 895, n. 11.

117. In setting an hourly rate, a court should establish, from information provided to it and from its own analysis of the level of performance and skills of each

lawyer whose work is to be compensated, a billing rate for each lawyer based upon the norm for comparable lawyers in private firms. *Ramos*, 713 F.2d at 555. The rule in the Tenth Circuit is that **current** hourly rates, rather than adjusted historic rates, should be used to compensate for delays in payment. *Id.*

118. In examining the evidence on market rates, as summarized in the Findings of Fact, and applying the legal analysis as mandated by *Ramos* and *Blum*, the Court concludes Plaintiffs should be awarded the following hourly rates:

Attorney	Hourly Rate Sought
Louis W. Bullock	$300.00
Patricia W. Bullock	$250.00
Robert M. Blakemore	$165.00
Michael J. Lissau	$185.00
Thomas Gilhool	$300.00
James Eiseman, Jr.	$300.00
Michael Churchill	$300.00

Plaintiffs have presented ample evidence that these hourly rates are rates charged by other lawyers in this community of comparable skill, experience reputation.

119. Defendants' objections to these hourly rates are unconvincing and without merit.

120. Mr. Schratz has no apparent expertise with regard to local market rates, and contrary to the rule of *Ramos*, the rates which he recommends are not current rates. Defendants have simply offered no good reason to reduce the hourly rates as proposed by Plaintiffs' expert Ms. Quinn Cooper.

C. Final Lodestar Calculation

121. Based upon the foregoing findings of reasonable rates and reasonable hours, the Court calculates the lodestar as follow:

Bullock & Bullock Lodestar:

Timekeeper	Requested Hours	Awarded Hours	Rate	Total
Louis W. Bullock	1,165.15	1,165.15	$300.00	$349,545.00
Patricia W. Bullock	595.75	595.75	$250.00	$148,937.50
Robert M. Blakemore	2,351.45	2,351.45	$165.00	$387,989.25
Michael J. Lissau	15.60	15.60	$185.00	$2,886.00
TOTAL				**$889,357.75**

PILCOP Lodestar:

Timekeeper	Requested Hours	Awarded Hours	Rate	Total
Thomas Gilhool	361.00	361.00	$300.00	$108,300.00
James Eiseman, Jr.	192.20	192.20	$300.00	$57,660.00
Michael Churchill	12.40	12.40	$300.00	$3,720.00
TOTAL				**$169,680.00**

II. FEE AWARDS IN SIMILAR CASES

122. The United States Supreme Court has referenced "awards in similar cases" as one of the factors district courts may consider in calculating attorneys' fees in civil rights actions. *See Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (citing the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974)); and *Hensley v. Eckerhart*, 461 U.S. 424, 430 and n. 3 (1983) (same). See also *Sinajini v. Board of Education of the San Juan County School District*, 53 Fed.Appx. 31, *37 (10th Cir. 2002) (citing *Blanchard and Hensley*).

123. As Ms. Rosenbaum noted in her Report:

> ...[F]ees in [other] complex EPSDT cases are substantial; indeed, they bear a striking resemblance to the fees sought in this case, precisely because lawsuits aimed at proof of practices that result in diminished access to care [are] far more factually intensive.

Plfs. Ex. 3 at 17. As examples, Ms. Rosenbaum cites the *John B. v. Menke*, No. 3-98-168 (M.D.Tenn.), and *Salazar v. District of Columbia*, 93-452 (D.D.C.), cases where the plaintiffs were awarded $1.3 million and $1.6 million in fees respectively. *Id. See also*

Plfs. Ex. 8 at 42; and Ex. 9. It is worth noting that the $1.6 million awarded in *Salazar* was awarded in January of 1999.

124. In *Memisovski v. Maram*, Case No. 92-C-1982 (N.D.Ill.), which involved claims virtually identical to those in the case at bar, the plaintiffs were awarded **$4.4 million** in fees and expenses. Plfs. Ex. 10.

125. The fees awards in these cases lend further support to the overall reasonableness of Plaintiffs' request for fees herein.

III. MR. SCHRATZ'S VIOLATION OF RULE 26

126. Rule 26(a)(2)(B) provides specific requirements as to the contents of expert reports. In pertinent part, Rule 26(a)(2)(B) requires expert reports to contain "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

127. Despite this Rule, Plaintiffs discovered several recent cases in which Mr. Schratz offered expert testimony, but which Mr. Schratz failed to mention in his Report. *See Lopez v. San Francisco Unified School District*, 385 F.Supp.2d 981 (N.D.Cal. 2005); *Mahtesian v. Snow*, 03-5372, 2004 WL 2889922 (N.D.Cal.); and *Oberfelder v. City of Petaluma*, C-98-1470, 2002 WL 472308 (N.D.Cal.). In all of these cases, the Court refused to consider certain aspects of Mr. Schratz's testimony.

128. At the fee hearing, Mr. Schratz did not deny that he had failed to disclose several cases in which he had offered expert opinions within the preceding four years. However, Mr. Schratz claimed that he was not required to disclose these cases because his opinions in those cases were offered via expert affidavits. Therefore, according to

Mr. Schratz, he had not actually "testified" at any of those cases and, thus, that those cases fall outside of the scope of Rule 26(a)(2)(B).

129. The Court rejects Mr. Schratz's interpretation of Rule 26(a)(2)(B) as being a disingenuous attempt to evade the Rule and to avoid disclosing cases to the Court which reflect poorly on his qualifications and opinions. Black's Law Dictionary defines "testimony" as "[e]vidence that a competent witness under oath or affirmation gives at trial ***or in an affidavit*** or deposition." Black's Law Dictionary 1596 (7th ed. 1999) (emphasis added). *See also Zeigler Coal Company v. Director, Office of Workers' Compensation Programs*, 326 F.3d 894, 901 n. 7 (7thCir. 2003) (adopting Black's definition of testimony); and *O'Bradovich v. Village of Tuckahoe*, 325 F.Supp.2d 413, 424 n. 1 (S.D.N.Y. 2004) (same). Indeed, the United States Supreme Court has described affidavits as the "functional equivalent" of "*ex parte* in-court testimony." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Clearly, sworn affidavits, especially sworn affidavits offered in lieu of live testimony, are "testimony."

130. It would be truly absurd to allow experts to avoid Rule 26(a)(2)(B)'s disclosure requirements simply because the expert had offered opinions in other cases via affidavit. This is especially true in the attorney fee expert arena where, as Mr. Schratz testified, expert affidavits are often admitted into evidence in lieu of live testimony. Mr. Schratz has deliberately violated Rule 26(a)(2)(B), which weighs heavily against his credibility as an "expert" witness. The Court explicitly finds that Mr. Schratz is not a credible witness, and discounts the weight of his testimony accordingly.

IV. EXPENSES/COST ITEMS

131. "Reasonable expenses incurred in representing a client in a civil rights case should be included in the attorney's fee award if such expenses are usually billed in addition to the attorney's hourly rate." *Case*, 157 F.3d at 1257 (citing *Ramos*, 713 F.2d at 559). Plaintiffs seek the following categories of expenses: (1) paralegal and clerk fees; (2) postage, shipping and courier; (3) copying, reproduction and printing; (4) long distance and phone conference expenses; (6) court reporters; (7) electronic research; (8) process service expenses; (9) attorney and staff travel and lodging expenses; and (10) witness travel and lodging expenses.

132. There is no dispute in this case that all of the categories of expenses which Plaintiffs seek are "usually billed in addition to the attorney's hourly rate." *Id.* And, as set out in the Findings of Fact, none of the objections raised by Defendants as to the reasonableness of expenses sought are well-founded, except for the claim that in-house copies should be billed at 10 cents per copy rather than 20 cents per copy. With this caveat in mind, the Court hereby awards Plaintiffs expenses as follows:

Bullock & Bullock Expenses:

B&B Legal Ass'ts and Clerks	Hours Expended	Amount Sought	Subtotal Amt. Sought	TOTAL B&B LEGAL ASS'T AND CLERK EXP. SOUGHT
N. Hodge	774.80	$75.00	$58,110.00	
B. deJong	503.85	75.00	37,788.75	
K. Barker	186.05	35.00	6,511.75	
A. Bowline	135.90	35.00	4,756.50	
C. Wagner	5.00	35.00	175.00	
J. Fitzgerald	140.00	35.00	4,900.00	**$112,242.00**

B&B Other Expenses	Amt. Sought	TOTAL B&B OTHER EXP.
Postage, shipping and courier	$ 2,393.99	
Copying, reproduction and printing	31,257.57	
Long distance and phone conference expenses	710.95	
Court reporters	8,734.79	

Electronic research	3,959.38	
Filing fees	250.00	
Process service expenses	675.00	
Attorney and staff travel and lodging expenses	1,719.30	
Witness travel and lodging expenses	2,920.08	**$ 52,621.06**

PILCOP Expenses:

Time Period / Description	**Amt. Sought**	**TOTAL PILCOP EXP. SOUGHT**
Jan. – Dec. 2001: Copies, fax, overnight delivery, postage, telephone/long distance	$1,188.19	
Jan. 2002 – Mar. 2003: Copies, fax, overnight delivery, postage, telephone/long distance	650.27	
Apr. 2003 – Sept. 2004: Copies, fax, overnight delivery, postage, telephone/long distance, travel	3,471.75	
Oct. 2004 – June 2005: Copies, fax, postage, telephone/long distance	445.68	**$ 5,755.89**

Respectfully submitted,

s/Robert M. Blakemore
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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2006, I electronically transmitted the foregoing document to the Clerk of Court using ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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